Game of pleas

Valorization Addendum

Article 23 of the 2013 Maastricht University Regulation governing the attainment of doctoral degrees stipulates that a valorization addendum ought to be attached to any doctoral thesis.[718]

The Regulation provides for a number of questions to be answered in this addendum. I have decided to follow the list indicated and reply to those exact questions:

1. (Relevance) What is the social (and/or economic) relevance of your research results (i.e. in addition to the scientific relevance)?
2. (Target groups) To whom, in addition to the academic community, are your research results of interest and why?
3. (Activities / Products) Into which concrete products, services, processes, activities or commercial activities will your results be translated and shaped?
4. (Innovation) To what degree can your results be called innovative in respect to the existing range of products, services, processes, activities and commercial activities?
5. (Schedule & Implementation) How will this/these plan(s) for valorization be shaped?

In order to have a better understanding of the innovative character of this research, I deem it necessary to shortly lay out the state of the art in Empirical legal research (and more concretely in Empirical legal research in the field of European antitrust law) before addressing the questions raised above.

1 State of the Art

While empirical legal studies have been a more frequent phenomenon in the United States than in Europe,[719] there has been in an increase of such studies in relation to International law

[718] Regulation governing the attainment of doctoral degrees Maastricht University 2013, Article 23.
[719] Hüschelrath & Smuda 2016, p 333. Kritzer 2010, p 876.

in the past decade(s).[720] In European law, *Tridimas and Gari*for instance carried out a statistical analysis of the case law of the European Union.[721]

In European competition law there have been a number of statistical and empirical studies lately.[722] Firstly, there has been the research undertaken by *Montag*, who analyzed the case law relating to cartel decisions handed down from 1973 to 1994 with the caveat that the fine imposed had to be at least 3 Million Ecu.[723] This meant that merely 29 decisions formed part of this research, 13 of which were challenged in Luxemburg. The study investigates the success and partial success of the different challenges. Next, *Harding and Gibbs* used the Montag-template to carry out the same kind of research for the next decade.[724] They analyzed 16 cartel cases handed down in the period from 1995 to 2004.The *Camesasca* Team reviewed competition law cases to provide an estimation of the likelihood of future success of such cases.[725] This study inserts the pleas in four different categories (fines, procedure, facts / standard of proof and substantive assessment). Pleas which entail characteristics of more than one of these categories have been categorized in all the relevant categories. The research conducted by *Paemen and Blondeel* drew conclusions on the success of pleas raised in cartel cases in a 10 year time span.[726] While the choice of the categorization system used for the purposes of this research is not entirely clear, it seems to be closely related to the system used by the Court itself.Next, *Carree et al.* provided a statistical overview of the commission decisions under Articles 101, 102 and 106 from 1957 to 2004.[727] The research included 538 decisions and measured parameters like the duration of the investigation, the sector classification, the nationality and number of the parties the fine imposed, the length of the proceedings.[728]Finally, *Hüschelrath* investigated 88 cartel cases from the time span between 2000 and 2012. The study drew conclusions on the implications of certain characteristics of a decision for the procedure and its outcome. Interestingly, the study suggests that the finding of aggravating circumstances diminishes the likelihood that the addressee challenges the

[720]Posner & de Figueiredo 2005, Daniels &Trebilcock 2004, La Porta *et al.* 2003. Leeuw (2015, p 19) even calls it an empirical revolution in law.
[721]Tridimas&Gari 2010.
[722] Thus, classical fields of legal research, like case law analysis, have been recently been approached by using empirical methods of research (Schebesta, p 3).
[723] Montag 1996.
[724] Harding & Gibbs 2005.
[725]Camesasca*et al.* 2013, p. 2.
[726]Paemen&Blondeel 2017.
[727]Carree et al. 2010.
[728]Ibid, p. 97.

decision. My research came to the conclusion that, however, if such an undertaking challenges the decision, it can bring a plea challenging the aggravating circumstances and is not unlikely to succeed and have its fine lowered (see Chapter 16). Private enforcement of competition law (especially in the UK) has been empirically analysed by *Barry Rodger* in a number of books and articles focussing on different time spans and different jurisdictions.[729]*Sebastian Peyer* published an article dealing with private enforcement of competition law in Germany.[730]

Apart from these studies, the repertoire de la jurisprudence provides much information on the case law of the European Union. While the studies above mainly show the state of the art of quantitative empirical research in the field of European antitrust law, the repertoire de la jurisprudence provides a researcher with the courts point of view on the different aspects which have appeared in the case law of the Luxemburg court and is thus of a qualitative nature.

2 Valorization of the research

1. Relevance: What is the social (and/or economic) relevance of your research results (i.e. in addition to the scientific relevance)?

The research undertaken in my thesis is of great practical use to every stakeholder of European antitrust law because it clears up the otherwise rather unapproachable case law. The categorization system allows undertakings which are faced with antitrust charges, law firms representing those undertakings as well as commission officers dealing with these investigations to know the recent case law on all the different aspects that might occur in these cases. Thus the addressees can easily check which conditions the court has set with regard to the disclosure of relevant documents or the commission officers could review the standard of proof necessary for finding a single continuous infringement in Part II of this thesis.

[729]Rodger 2008, Rodger 2014, Rodger 2015, Rodger 2017 A, Rodger 2017 B.
[730]Peyer 2012.

Furthermore, Part II of this research provides the exact codebook I used in order to classify the pleas. Based on this codebook and the exact search criteria listed in Annex A, it is possible for researchers in the future to undertake the same kind of research for the cases which have been adjudicated before May 2004 or as of January 2017. That way, one could see whether or not the case law is changing, whether certain categories become - or have been - more or less successful or whether new ones emerge or increase or decrease in prominence.

2. Target groups: To whom, in addition to the academic community, are your research results of interest and why?

As mentioned above, the rather practical approach to the case law study in the field of European antitrust law makes this thesis very interesting for all kinds of practitioners working with Articles 101 and 102 TFEU. While the approach, the methodology and the empirical nature of the study will certainly make this thesis attractive to researchers which focus on empirical research or even computerized data analysis, the content which provides an excellent starting point for further investigation of specific issues in contemporary European antitrust law is rather aimed for practitioners.

3. Activities / Products: Into which concrete products, services, processes, activities or commercial activities will your results be translated and shaped?

The results of my research have been collected in a number of tables which were used to create the different tables and diagrams displayed in this book. In addition to the layout of the pleas in the categories and subcategories as explained in Part II, the frequency of the different categories and their success has also been displayed in diagrams and tables in Parts II, III and the Annexes to this thesis.

4. Innovation: To what degree can your results be called innovative in respect to the existing range of products, services, processes, activities and commercial activities?

The innovative character of this research becomes immediately apparent when being compared to the state of the art chapter above.Firstly, it must be pointed out that this thesis is

neither merely qualitative nor merely quantitative. It entails aspects of both types of research. By combining them, it is possible not only to quantify the number of successful pleas or cases but also to draw conclusions on the circumstances of the case or the plea which led to the success (like the factual background of the case or the exact way in which the plea has been structured. Also, unlike merely qualitative sources, this thesis gives the reader an impression of the actual prominence of the different categories, sub-categories and groups of pleas in contemporary antitrust proceedings.Secondly, unlike the studies mentioned above, this thesis indicates exactly what cases have been analyzed (Annex C), what search parameters have been used to obtain the list of cases to be analyzed (Annex A) and also includes extensive annexes stating which pleas have been found successful, arguably successful and unsuccessful, as well as the category to which the have been attributed.[731] Unfortunately, there have been other studies which stated that they would investigate the cartel cases adjudicated in a certain time frame and provided a number which was lower than the total number of cartel cases in that timeframe, which points towards more limitation being used for that research than having been stated. Thirdly, the categorization system developped in the course of this research is the most precise system employed at the time when this note is being written. It encompasses 169 categories and thereby exceeds by far the number of categories used for the studies mentioned above (except for the repertoire de la jurisprudence). Most of these studies, which categorize by plea, are based on the categorization system used by the court. Thus, the study by Paemen and Blondeel finds that 24% of the successful pleas belong in the "miscalculation of the fine" category. My study splits this category up in 9 subcategories (which are laid out in detail in Chapter 5.2) and finds a significantly lower success rate. This is due to the court often including arguments relating to principles like the principle of proportionality of equal treatment under the heading of "miscalculation of the fine". My research splits those pleas up and categorizes them according to their core arguments. Therefore, there will be a successful plea in one of the subcategories of those principles if that argument succeeded and an unsuccessful plea in one of the subcategories of the "miscalculation of the fine" category.Fourthly, since the repertoire de la jurisprudence seems to set the measuring stick for qualitative researches in European competition law, it must be mentioned that the repertoire is only available in French and thus arguably less accessible than this thesis (which is written in English).Fifthly, also in comparison to the

[731] The replicability of an empirical research is an important criterion for its credibility (Epstein & King 2002, p 38 & 103; Schebesta 2017, p 4).

repertoire, the family-tree-like categorization system[732] used in this thesis (groups – categories – subcategories) is arguably easier to access and navigate than the limited selection tools provided by the repertoire before being referred to a vast amount of legal issues displayed on one very extensive webpage.Sixthly, while the repertoire merely states the point of view of the court on a certain issues, this thesis starts with the plea as submitted by the parties and therefore includes more aspects of the pleas, which in turn allow us to draw conclusions on why a plea in a certain category has been successful in a given case but not in another one.Finally, while most of the studies mentioned above merely concern cartel cases, this study includes all EU competition law cases involving restrictive practices. Thus there have been Article 101 and 102 TFEU cases analyzed in this research. Based on the multitude of common factors in proceedings under these articles, the "construction" of a plea relating to the breach of the principle of proportionality in an future Article 102 TFEU case, can be inspired by similar pleas that were pleaded in cartel cases. This finding is particularly interesting, as the case law on Article 102 TFEU is considerably more limited than the Article 101 TFEU case law. Thus, this thesis will be very valuable for interested undertakings which allegedly abused their dominant position, since it gives them a much broader overview of recent pleas than they would have had if they had only considered Article 102 TFEU cases.

5. Schedule & Implementation: How will this/these plan(s) for valorization be shaped?

This thesis provides suggestions for practitioners in the field of European antitrust law which indicate on what categories of pleas they should focus in order to increase their chances of success in antitrust litigation.Firstly, there are a number of categories which have never been successful despite the fact that they have frequently been pleaded. Given the temporal and material limitations which the addressee's representatives have to face, it would be logical to consider pleas which would fit into one of these less successful categories only if there are excess resources.Secondly, there are a number of categories which have proven to be considerably more successful. For the same reasons, submissions in future proceedings should center on pleas fitting into those categories whenever possible.Thirdly, there is a considerable number of categories and subcategories containing very few pleas. Logically, the success rate of these pleas is rather secondary as it could drastically change the next time such a plea

[732] See Chapter 1.4.2.

would be raised. Thus, the die is not yet cast on those categories and it would be interesting to see in which way the success rate of these categories will develop in the future.